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STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

COMMUNITY PROPERTY IN JOINT TENANCY FORM

January 21, 1984

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN MARCH 31, 1984.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
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TENTATIVE RECOMMENDATION

relating to

COMMUNITY PROPERTY IN JOINT TENANCY FORM

A husband and wife in California may hold property in joint tenancy or as community property.[1] The two types of tenure, one common law and the other civil law, have different legal incidents--the spouses have different management and control rights and duties, creditors have different rights to reach the property, and the property is treated differently at dissolution of marriage and at death.[2]

In California it is common for husband and wife to take title to property in joint tenancy form even though the property is acquired with community funds. Frequently the joint tenancy title form is selected by the spouses upon the advice of brokers and other persons who are ignorant of the differences in legal treatment between the two types of property tenure. The spouses themselves are ordinarily unaware of the differences between the two types of tenure, other than that joint tenancy involves a right of survivorship.[3]

As a consequence, a person who is adversely affected by the joint tenancy title form may litigate in an effort to prove that the spouses did not intend to transmute the community property into joint tenancy. Because joint tenancy is often disadvantageous to the spouses, particularly the tax consequences of joint tenancy, the courts have been liberal in relaxing evidentiary rules to allow proof either that the spouses did not intend to transmute community property to joint tenancy or, if they did, that they subsequently transmuted it back.[4]

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1. Civil Code § 5104. The spouses may also hold property as tenants in common, although this is relatively infrequent.

2. See, e.g., Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983).

3. See, e.g., Bruch, The Definition and Division of Marital Property in California: Towards Parity and Simplicity, 33 Hastings L.J. 769 828-38 (1982).

4. See, e.g., Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143, 159-68 (1981).

The result has been general confusion and uncertainty in this area of the law, accompanied by frequent litigation[5] and negative critical comment.[6] It is apparent that the interrelation of joint tenancy and community property requires clarification.

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5. See, e.g., Siberell v. Siberell, 214 Cal. 767, 7 P.2d 1003 (1932); Delanoy v. Delanoy, 216 Cal. 23, 13 P.2d 513 (1932); Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905 (1944). Cases struggling with the issue in the past few years include In re Marriage of Lucas, 27 Cal.3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980); In re Marriage of Camire, 105 Cal. App.3d 859, 164 Cal. Rptr. 667 (1980); In re Marriage of Gonzales, 116 Cal. App.3d 556, 172 Cal. Rptr. 179 (1981); In re Marriage of Cademartori, 119 Cal. App.3d 970, 174 Cal. Rptr. 292 (1981); In re Marriage of Mahone, 123 Cal. App.3d 17, 176 Cal. Rptr. 274 (1981); Badillo v. Badillo, 123 Cal. App.3d 1009, 177 Cal. Rptr. 56 (1981); In re Marriage of Hayden, 124 Cal. App.3d 72, 177 Cal. Rptr. 183 (1981); Estate of Levine, 125 Cal. App.3d 701, 178 Cal. Rptr. 275 (1981); In re Marriage of Miller, 133 Cal. App.3d 988, 184 Cal. Rptr. 408 (1982); Kane v. Huntley Financial, 146 Cal. App.3d 1092, 194 Cal. Rptr. 880 (1983); In re Marriage of Stitt, 147 Cal. App.3d 579, 195 Cal. Rptr. 172 (1983).

6. See, e.g., Comment, 5. S. Cal. L. Rev. 144 (1931); Miller, Joint Tenancy as Related to Community Property, 19 Cal. St. B.J. 61 (1944); Note, 32 Calif. L. Rev. 182 (1944); Lyman, Oral Conversion of Property by Husband and Wife from Joint Tenancy to Community Property, 23 Cal. St. B.J. 146 (1948); Marshall, Joint Tenancy Taxwise and Otherwise, 40 Calif. L. Rev. 501 (1952); Brown & Sherman, Joint Tenancy or Community Property: Evidence, 28 Cal. St. B.J. 163 (1953); Joint Tenancy v. Community Property in California: Possible Effect Upon Federal Income Tax Basis, 3 UCLA L. Rev. 636 (1956); Griffith, Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961); Ferrari, Conversion of Community Property into Joint Tenancy Property in California: The Taxpayer's Position, 2 Santa Clara Lawyer 54 (1962); Griffith, Joint Tenancy and Community Property, 37 Wash. L. Rev. 30 (1962); Backus, Supplying or Prescribing Community Property Forms, 39 Cal. St. B.J. 381 (1964); Tax, Legal, and Practical Problems Arising From the Way in Which Title to Property is Held by Husband and Wife, 1966 S. Cal. Tax'n Inst. 35 (1966); Knutson, California Community Property Laws: A Plea for Legislative Study and Reform, 39 S. Cal. L. Rev. 240 (1966); Mills, Community Joint Tenancy--A Paradoxical Problem in Estate Administration, 49 Cal. St. B.J. 38 (1974); Property Owned with Spouse: Joint Tenancy by the Entireties and Community Property, 11 Real Prop. Prob. & Tr. J. 405 (1976); Sims, Consequences of Depositing Separate Property in Joint Bank Accounts, 54 Cal. St. B.J. 452 (1979); Mills, Community/Joint Tenancy Avoid a Tax Doubleplay; Touch the Basis, 1979 S. Cal. Tax'n Inst. 951 (1979); Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981); Bruch, The Definition and Division of Marital Property in California: Toward Parity and Simplicity, (1981); Comment, 3 Whittier L. Rev. 617 (1981); Comment, 15 U.C.D. L. Rev. 95 (1981); Comment, 15 Loy. L.A. L. Rev. 157 (1981); Thomas, Marriage of Lucas and The Need for Legislative Change, Fam. L. News & Rev., Fall 1982, at 8; Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983).

Legislation enacted in 1965 directly addressed the problem of married persons taking title to property in joint tenancy form without being aware of the consequences and in fact believing the property is community.[7] Civil Code Section 5110 provided that a single-family residence acquired during marriage in joint tenancy form is presumed community property for purposes of dissolution of marriage. This presumption has had a beneficial effect and was expanded in 1983 to apply to all property acquired during marriage in joint tenancy form.[8] The 1983 legislation also made clear that the community property presumption may be rebutted only by a clear writing by the spouses, but that separate property contributions are reimbursable at dissolution of marriage.[9]

This expansion is sound and should be effective to eliminate much of the confusion in this area of the law. However, the presumption is limited to dissolution of marriage. In order to clarify the property rights of the spouses generally, property acquired during marriage in joint tenancy form should be presumed community for all purposes, rebuttable by an express written agreement. This will correspond to the intention of most married persons not to lose basic community property protections merely by taking property in a joint tenancy title form.

If the spouses intend anything when they take title to property in joint tenancy form, it is that the property should pass at death to the surviving spouse without probate. Treating the property as community at death will enable passage at death to the surviving spouse without probate,[10] and will also ensure favorable tax treatment.[11] However, the

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7. Cal. Assem. Int. Comm. on Judic., Final Report relating to Domestic Relations, reprinted in 2 App. J. Assem., Cal. Leg. Reg. Sess. 123-24 (1965).

8. Civ. Code § 4800.1, enacted by 1983 Cal. Stats. ch. 342, § 1. See California Law Revision Commission--Report Concerning Assembly Bill 26, 1983 Senate Journal 4865 (1983).

9. Civ. Code § 4800.2, enacted by 1983 Cal. Stats. ch. 342, § 2.

10. Prob. Code § 202, reenacted as Prob. Code § 649.1, operative January 1, 1985.

11. See Reppy, Debt Collection from Married Californians: Problems Caused by Transmutations, Single-Spouse Management and Invalid Marriage, 18 San Diego L. Rev. 143, 238-40 (1981); cf. Parks, Critique of Nevada's New Community Property With Right of Survivorship, 10 Comm. Prop. J. 5 (Winter 1983).

intended survivorship right should also be given some recognition.[12] The right of testamentary disposition over community property in joint tenancy form should be exercisable only by specific devise of the property or by a devise that makes specific reference to community property held in joint tenancy form. This will make clear that the testamentary disposition of the property is intentional, and will ensure that absent such an intentional testamentary disposition the property will pass automatically by intestate succession to the surviving spouse.[13]

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to add Article 5 (commencing with Section 5110.510) to Title 8 of Part 5 of Division 4 of, and to repeal Section 4800.1 of, the Civil Code, relating to community property.

The people of the State of California do enact as follows:

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12. This is consistent with the recommendation of many commentators who have studied the matter as well as with the law of other community property jurisdictions that permit the spouses to hold community property subject to a right of survivorship. See, e.g., Griffith, Community Property in Joint Tenancy Form, 14 Stan L. Rev. 87 (1961). Idaho, New Mexico, and Washington recognize survivorship agreements between the spouses. Nevada provides for a title form of community property with right of survivorship. Nev. Rev. Stat. § 111.064(2) (1981). It is also analogous to treatment given deposits by married persons in joint accounts in financial institutions under the California Multiple-Party Accounts Law. Prob. Code § 5305, enacted by 1983 Cal. Stats. ch. 92; see Recommendation Relating to Nonprobate Transfers, 16 Cal. L. Revision Comm'n Reports 129 (1982).

13. Prob. Code § 201, reenacted as Prob. Code §§ 6400-6401, operative January 1, 1985.

Civil Code § 4800.1 (repealed)

SECTION 1. Section 4800.1 of the Civil Code is repealed.

~~4800.1. For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption is a presumption affecting the burden of proof and may by rebutted by either of the following:~~

~~(a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.~~

~~(b) Proof that the parties have made a written agreement that the property is separate property.~~

Comment. The substance of former Section 4800.1 is continued in Section 5110.510 (community property presumption).

31559

Civil Code §§ 5110.510-5110.590 (added)

SEC. 2. Article 5 (commencing with Section 5110.510) is added to to [Chapter 2 of] Title 8 of Part 5 of Division 4 of the Civil Code, to read:

Article 5. Community Property In Joint Tenancy Form

§ 5110.510. Community property presumption

5110.510. (a) Property the title to which is taken in joint tenancy form by married persons during marriage is presumed to be community property.

(b) The presumption established by this section is a presumption affecting the burden of proof and may be rebutted by either of the following:

(1) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property.

(2) Proof that the married persons have made a written agreement that the property is separate property and not community property.

(c) The presumption established by this section may not be rebutted by tracing the contributions to the acquisition of the property to a separate property source. Nothing in this subdivision limits the right

of a party to reimbursement for separate property contributions pursuant to Section 4800.2.

Comment. Section 5110.510 creates an exception to the presumption of Section 683 that property held in joint tenancy form is joint tenancy. Instead, property taken in joint tenancy form during marriage is presumed to be community property. This reverses case law that treated community property in joint tenancy form as either community property or joint tenancy, depending upon the intent of the parties. See, e.g., discussion in Sterling, Joint Tenancy and Community Property in California, 14 Pac. L.J. 927 (1983). Section 5110.510 is consistent with former Section 4800.1 (for purposes of division, property acquired in joint tenancy form during marriage presumed to be community property), and expands the community property presumption for all purposes of characterization, not just for purposes of division at dissolution of marriage. Section 5110.510 does not distinguish between community property and quasi-community property, since both spouses have a current interest in property held in joint tenancy form.

The presumption of Section 5110.510 may be overcome by contrary evidence of the express intention of the parties in the form of a written statement, in the deed or otherwise, negating the community character and affirming the separate character of the property. Subdivision (b). This will help ensure that any transmutation of community property to separate property by the spouses is in fact intentional.

Ownership of property presumed to be community pursuant to this section is qualified by a reimbursement right at dissolution for separate property contributions to its acquisition. Section 4800.2. In the case of property initially acquired before marriage, the title to which is taken in joint tenancy form during marriage, the measure of the separate property contribution is the value of the property at the time of its conversion to joint tenancy form.

045/127

§ 5110.520. Limitation on testamentary disposition

5110.520. (a) Notwithstanding Section 6101 of the Probate Code, a married person may not make a testamentary disposition of the person's one-half of community property in joint tenancy form except by a specific disposition of the property or by a disposition that makes specific reference to community property in joint tenancy form.

(b) Subdivision (a) does not apply to the extent the right of testamentary disposition of the property is governed by a written agreement between the married persons, including an agreement without limitation that the property is community property.

Comment. Subdivision (a) of Section 5110.520 imposes a limitation on testamentary disposition of community property in joint tenancy form that the property be given by a specific devise or by a specific reference to property of that type in a devise. This is intended to ensure that absent a clear and specific intent to dispose of the property, it passes to the survivor. Apart from this limitation, community property in joint tenancy form is community for all purposes and receives community

property treatment at death, including tax and creditor treatment and passage without probate (unless probate is elected by the surviving spouse). Prob. Code § 649.1. Because the names of both spouses appear on the property title in this form of tenure, title in the survivor may in the ordinary case be cleared by affidavit in the same manner as joint tenancy, without the need for court confirmation pursuant to Section 650 of the Probate Code.

Subdivision (b) makes clear that the limitation on testamentary disposition applies only absent a written agreement of the married persons that is intended to control. Thus a community property agreement entered into by the spouses that makes no reference to testamentary rights should be construed as an agreement that community property in joint tenancy form is community property for all purposes, without limitation on the right of testamentary disposition.

405/901

§ 5110.550. Joint bank accounts

5110.550. This article does not apply to a joint account in a financial institution if Part 1 (commencing with Section 5100) of Division 5 of the Probate Code applies to the account.

Comment. Section 5110.550 makes clear that the Probate Code provisions governing joint accounts prevail over this chapter. See Prob. Code § 5305 (presumption that sums on deposit are community property).

405/793

§ 5110.590. Transitional provisions

5110.590. (a) As used in this section, "operative date" means January 1, 1986.

(b) Subject to subdivisions (c) and (d), this article applies to all property acquired by married persons before, on, or after the operative date.

(c) This article does not apply until one year after the operative date to property acquired in joint tenancy form by married persons before the operative date, regardless whether payments on or additions to the property are made after the operative date. During this period the property is governed by the law applicable before the operative date, and to this extent the law applicable before the operative date is preserved.

(d) This article does not apply to any transaction involving the property that occurred before the operative date, including but not limited to inter vivos or testamentary disposition of the property by a married person and division of the property at dissolution of marriage.

Such a transaction is governed by the law applicable before the operative date.

Comment. Section 5110.590 makes clear the legislative intent to make this article fully retroactive to the extent practical, consistent with protection of the security of transactions involving the spouses or third persons that occurred before the operative date. Retroactive application is supported by the importance of the state interest served by clarification and modernization of the law of joint tenancy and community property, the generally procedural character of the changes in the law, and the lack of a vested right in joint tenancy property due to the severability of the tenure. In addition, Section 5110.590 provides a one-year grace period after the operative date during which persons who acquired property before the operative date may make any necessary title changes or agreements or other arrangements concerning the property.